STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN FEDERATION OF TEACHERS
AND SCHOOL RELATED PERSONNEL,
AFT, AFL-CIO,

Plaintiff-Appellee,

v

UNIVERSITY OF MICHIGAN,

Defendant-Appellant.

_____ /

Supreme Court No. 133819

Court of Appeals No. 258666

Washtenaw County Circuit Court
No. 04-314-CZ

# AMICUS CURIAE BRIEF OF ATTORNEY GENERAL MICHAEL A. COX IN SUPPORT OF THE UNIVERSITY OF MICHIGAN

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## QUESTION PRESENTED FOR REVIEW

I. **Whether the Michigan Supreme Court should reconsider its construction of MCL 15.243(1)(a)'s statutory phrase "information of a personal nature" as meaning information that "reveals intimate or embarrassing details of an individual's private life," as set forth in *Bradley v Saranac Board of Education*, 455 Mich 285, 294 (1997).**

II. **Whether, on the facts of this case, information that might otherwise be considered "ordinarily impersonal . . . might take on an intensely personal character," [quoting *Kestenbaum v Michigan State Univ*, 414 Mich 510, 547 (1982)], such that the privacy exemption might properly be asserted as argued by the defendant.**

III. **If the *Bradley* test is not modified, whether the advent of the National Do-Not-Call Registry, PL 108-82, § 1, 117 Stat 1006, as well as the creation of the host of methods, unknown to the Court in 1997, which are designed for illicit purposes such as identity theft, have any impact on whether the disclosure of the home addresses and telephone numbers requested is inconsistent with "the customs, mores, or ordinary views of the community" (quoting *Bradley*, at 294) by which the applicability of the privacy exemption is evaluated.**

## STATEMENT OF PROCEEDINGS AND FACTS

The Attorney General, on behalf of the State of Michigan, as amicus curiae, accepts the statement of facts and proceedings set forth in Defendant-Appellant's application for leave to appeal.

## INTRODUCTION

In this Freedom of Information Act case, the Court of Appeals noted that Defendant-Appellant (hereinafter, the University of Michigan ) "persuasively argues that the disclosure of names, home addresses and telephone numbers of some of the [University of Michigan's] employees could expose these employees to threats, harm, and peril."[1] Nevertheless, the Court of Appeals reversed the trial court's grant of summary disposition to the University of Michigan and remanded the case to provide an opportunity for the University of Michigan to "determine whether any of its employees . . . have demonstrated 'truly exceptional circumstances' to prevent disclosure of names, addresses and telephone numbers."[2]

Attorney General Michael A. Cox, on behalf of the State of Michigan, as amicus curiae, has an interest in this issue. As counsel to all state departments, agencies, commissions, and boards, the Attorney General advises his clients on the application of the Freedom of Information Act[3] (FOIA) and is called upon to represent them in litigation under that act. A settled position on this question of jurisprudential significance is needed by those who are obliged to comply with FOIA.

The Court of Appeals was misguided in requiring public employees to make particularized showings of harm of present threat, including, but not limited to the threat of identity theft before qualifying for the privacy exemption.[4] FOIA generally requires only the disclosure of personal information concerning public employees that advances the "core purpose" of the FOIA—"to provide full and complete information regarding the affairs of

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[1] Unpublished opinion per curiam, issued March 22, 2007, (Docket No. 25866), p 3; copy appended as Exhibit A to Appellant's Application for Leave to Appeal.
[2] Unpublished opinion per curiam, issued March 22, 2007, (Docket No. 25866), p 3; copy appended as Exhibit A to Appellant's Application for Leave to Appeal.
[3] MCL 15.231 *et seq.*
[4] As to identity theft, it cannot be seriously disputed that it is a universal threat to all citizens.

government and the official acts of those who represent [the people] as public officials and public employees . . . so that [the people] may fully participate in the democratic process."[5] The public disclosure of public employees' home addresses and home telephone numbers does not advance the FOIA's core purpose. Therefore, it is important that this Court decide the instant case consistent with the Court's ruling in *Mager v Dep't of State Police*.[6]

Moreover, in ruling as it did, the Court of Appeals erred in a number of significant ways:

1) it defined "information of a personal nature," MCL 15.243(1)(a), to mean information that only reveals "intimate or embarrassing details of an individual's private life,"[7] a phrase that deviates substantially from the plain meaning of the statute;

2) it failed to recognize the difference between *performance-related* personnel information, which generally is disclosable, and *non-performance-related* personnel information, which should be protected and failed to recognize, on the facts presented in this case, that information that might otherwise be considered "ordinarily impersonal . . . might take on an intensely personal character"[8];

3) it failed to place appropriate reliance on more recent cases of this Court and the Court of Appeals in which the importance of the FOIA's "core purpose" in analyzing disclosure issues has been established; and

4) it failed to properly account for the revolutionary changes in information technology that should be factored into any proper determination of whether, under present circumstances, public disclosure of personal information constitutes an exemption under section 13(1)(a) of the FOIA, (which provides that a public body may exempt information of a personal nature, the

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[5] MCL 15.231(2).
[6] *Mager v Dep't of State Police*, 460 Mich 134; 595 NW2d 142 (1999).
[7] *Bradley v Saranac Community Schools*, 455 Mich 285; NW2d 650 (1997).
[8] *Kestenbaum v Michigan State University*, 414 Mich 510, 547 (1982).

disclosure of which would constitute a "clearly unwarranted invasion of an individual's privacy")[9] or whether the advent of the National Do-Not-Call Registry,[10] as well as the creation of the host of methods, unknown to the Court in 1997, which are designed for illicit purposes such as identity theft, have any impact on whether the disclosure of the home addresses and telephone numbers requested is inconsistent with "the customs, mores, or ordinary views of the community."[11]

FOIA's privacy exemption is not a static concept; it is not fixed to a time when the nature and volume of information being exchanged was more limited and the pace was slower. This Court has recognized that societal conditions change and that public bodies can—consistent with the language of the FOIA—make appropriate adjustments to protect the privacy of individuals, including their own employees.[12]

For the foregoing reasons, the Attorney General, as amicus curiae, requests this Honorable Court to reverse the Court of Appeals and rule that the home addresses and the home telephone numbers of University of Michigan employees are exempt from disclosure under FOIA.

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[9] MCL 15.243(1)(a).
[10] PL 108-82, § 1, 117 Stat 1006.
[11] *Bradley*, at 294.
[12] See, *e.g.*, *Mager,* 460 Mich at 137-143.

## ARGUMENT

### I. Home Addresses And Home Telephone Numbers Are Exempt From Disclosure Under MCL 15.243(1)(A) Because They Are "Information Of A Personal Nature."

#### A. Standard of Review

This case concerns the interpretation of a statute, MCL 15.243(1)(a); it presents questions of law that are reviewed *de novo*.[13]

#### B. Analysis

##### 1. *Bradley v Saranac Board of Education* interpreted MCL 15.243(1)(a)'s statutory phrase "information of a personal nature" to mean information that "reveals intimate or embarrassing details of an individual's private life," but that is not the statute's only meaning.

The Court of Appeals below[14] began its analysis by examining *Bradley v Saranac Community Schools Board of Education, Lansing Ass'n of School Adm'rs v Lansing School District*.[15] Relying on *Bradley*, the Court of Appeals held that home addresses and telephone numbers of public employees, "by themselves," do not reveal "intimate or embarrassing details' of one's life."[16] The Court of Appeals made a mistake by relying solely on *Bradley* and an incorrect narrow definition of "information of a personal nature." That narrow definition is inconsistent with the plain meaning of the statute and is based on incorrect extrapolation from opinions that are distinguishable from the present case.

In *Bradley*, this Court dealt with the FOIA privacy exemption, as applied to the disclosure of public school teachers' and administrators' personnel files. The privacy exemption says that "[a] public body may exempt from disclosure as a public record . . . [i]nformation of a personal

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[13] *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 525-526; 697 NW2d 895 (2005).
[14] Unpublished opinion per curiam, issued March 22, 2007 (Docket No. 25866), p 2; copy appended as Exhibit A to Appellant's Application for Leave to Appeal.
[15] *Bradley*, 455 Mich at 285.
[16] Unpublished opinion per curiam, issued March 22, 2007, (Docket No. 25866), p 3; copy appended as Exhibit A to Appellant's Application for Leave to Appeal

nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy."[17] As the Court first noted, "The privacy exemption consists of two elements, both of which must be present for the exemption to apply. First, the information must be of a 'personal nature.' Second, the disclosure of such information must be a 'clearly unwarranted invasion of privacy."[18] The Court then quoted from two earlier decisions that had used slightly differing formulations to describe information of a "personal nature," and then derived "a more succinct test" to apply in the circumstances there[19]:

> [W]e conclude that information is of a personal nature if it reveals intimate or embarrassing details of an individual's private life. We evaluate this standard in terms of 'the customs, mores, or ordinary views of the community'. . . .

The information sought in *Bradley* consisted of corrective or disciplinary actions, complaints filed, performance evaluations, and administrative performance reviews. The Court evaluated the documents under seal to determine whether they contained "information of an embarrassing, intimate, private, or confidential nature, such as medical records or information relating to the plaintiffs' private lives."[20] Noting that the party had not alleged "specific private matters that would be revealed by the disclosure of their personnel records," the Court concluded that those personnel records did not "satisfy the personal-nature element of the privacy exemption."[21] There is nothing in *Bradley,* nothing in the cases *Bradley* relied on, and nothing in the text of the statute indicating that "personal information" under the statute is limited *only* to "intimate or embarrassing details." The language the *Bradley* Court used to describe its test—

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[17] MCL 15.243(1)(a).
[18] *Bradley*, 455 Mich at 294, citing *Swickard v Wayne Co Medical Examiner*, 438 Mich. 536, 547; 475 NW2d 304 (1991), and quoting *The American Heritage Dictionary of the English Language*: Second College Ed.
[19] *Bradley*, 455 Mich at 294.
[20] *Bradley*, 455 Mich at 295.
[21] *Bradley*, 455 Mich at 295. Because the Court concluded that the records were not of a "personal nature," it was not necessary to consider whether disclosure of the personnel files was a "clearly unwarranted invasion of privacy.

calling it "a more succinct test" rather than describing it as "the" test—demonstrates that the formulation is not the exclusive test because this Court has recognized that the word "a" does not mean "the": "Traditionally in our law, to say nothing of our classrooms, we have recognized the difference between 'the' and 'a.'"[22] The *Bradley* Court, in fact, did not even limit itself to the test it articulated. As quoted above, it examined not only whether the information revealed intimate or embarrassing personal details; it went on to examine whether the information was "of an embarrassing, intimate, private, or confidential nature," whether it "[related] to . . . private lives," or would reveal "specific private matters."

Nor do the cases cited by *Bradley* compel such a limitation. *Bradley* cited *Swickard*, in which parties sought to prevent disclosure of an autopsy report and toxicology test. The Court held there was no exemption from disclosure because any privacy rights of the deceased did not survive his death; because "no private facts concerning the family" or "information personal to the family" would be revealed by the information; and because the circumstances surrounding the death of that public figure were matters of legitimate public concern.[23] Unlike the autopsy report in *Swickard*, the home addresses and home telephone numbers requested in the present case do not involve matters of public concern but do implicate private facts and personal information of living individuals.

*Bradley* also cited one of the two opinions in *Kestenbaum v Michigan State University*,[24] in support of the point that "personal information" under the statute involves information that is "personal, intimate, or embarrassing." *Kestenbaum* involved a FOIA lawsuit seeking disclosure

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[22] *Robinson v City of Detroit*, 462 Mich. 439, 461, 458-462; 613 NW 2d 307 (2000) (overruling prior case law that had interpreted the phrase "the proximate cause" to mean "a proximate cause").

[23] *Swickard*, 438 Mich at 556-558.

[24] *Kestenbaum v Michigan State University*, 414 Mich 510, 549; 377 NW2d (1982)(opinion of Ryan, J., and two other Justices).

of names and addresses of University students. The trial court ordered disclosure but the Court of Appeals reversed and this Court affirmed by an equally divided Court. There were two opinions, each signed by three Justices, so neither of them has precedential authority.[25] *Bradley* cited the opinion favoring disclosure, but the opinion opposing disclosure has equal authority: "any intrusion into the home, no matter the purpose or the extent, is definitionally an invasion of privacy. *A fortiori*, the release of names and addresses constitutes an invasion of privacy, since it serves as a conduit into the sanctuary of the home."[26]

The text of the exemption for "information of a personal nature" in MCL 15.243(1)(a) is not limited only to personal, intimate, or embarrassing information. There is no language in the statute that suggests that "personal" means only "intimate or embarrassing." This Court has held that statutes are to be interpreted based on the wording of the statute itself because the Legislature is presumed to understand the meaning of the language that it enacts into law.[27] Courts cannot add words or conditions to the statute that are not present in the statute itself.[28] This Court has repeatedly emphasized that the unambiguous language of a statute must be enforced as written and that dictionary definitions of a word may be consulted to determine the plain and ordinary meaning of a word where a term is undefined in a statute.[29] The Court has a duty to apply the language of an unambiguous statute as it is enacted, without addition,

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[25] *Negri v Slotkin,* 397 Mich 105, 109; 244 NW2d 98 (1976)("Plurality decisions in which no majority of the justices participating agree as to the reasoning are not an authoritative interpretation binding on this Court under the doctrine of *stare decisis.*")
[26] *Kestenbaum*, 414 Mich at 424-425 (opinion of Fitzgerald, C.J., and two other Justices).
[27] *Robinson v City of Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000).
[28] See, *Rowland v Washtenaw County Road Comm'n*, 477 Mich 197, 214, n 10; 731 NW2d 41 (2007).
[29] See, *e.g.*, *Title Office, Inc v Van Buren County Treasurer*, 469 Mich 516, 522; 676 NW2d 207 (2004); *Sun Valley Foods v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999); See also, MCL 8.3a -- "All words and phrases shall be construed and understood according to the common and approved usage of the language . . .."

subtraction or modification.[30] Where the Legislature has not defined the terms used in the statute, however, the Court can consult dictionary definitions to determine their "ordinary and generally accepted meanings."[31]

In *Swickard v Wayne County Medical Examiner*,[32] this Court used this approach and found that the *American Heritage Dictionary of the English Language* (1976) defined "personal" as "[o]f or pertaining to a particular person; private; one's own . . . Concerning a particular individual and his intimate affairs, interests, or activities . . . ."

2. The personal privacy FOIA exemption analysis under *Mager* should have been applied by the Court of Appeals in the instant case.

Since the effective date of the FOIA over 30 years ago, the appellate courts of this State have decided a number of cases concerning the application of section 13(1)(a) of the FOIA.[33] This application involves a two-prong test: whether the information at issue is of a personal nature, and, if so, whether the invasion of privacy resulting from the release of this personal information would be "clearly unwarranted."[34] Where it is determined that records constitute purely public information, no further analysis is required.

While *Bradley* might constitute an appropriate starting point in the analysis of the privacy exemption of section 12(1)(a) of the FOIA, it does not provide a complete answer in the present case. The information sought in *Bradley* was simply personnel records of certain public employees. Unlike the present case seeking private home addresses and telephone numbers, in *Bradley* there was nothing sought of "an embarrassing, intimate, private, or confidential nature,"

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[30] *Lesner v Liquid Disposal Inc*, 466 Mich 95, 101; NW2d 553 (2002).
[31] *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999).
[32] *Swickard v Wayne County Medical Examiner*, 438 Mich 536, 547; 475 NW2d 304 (1991).
[33] *Mager*, 460 Mich at 137-142.
[34] *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 232; 507 NW2d 422 (1993).

there was nothing "relating to the [employees'] private lives," and no "specific private matters would be revealed."

The proper analysis of the FOIA's privacy exemption in the present case is contained in *Mager v Dep't of State Police*,[35] which was decided two years after *Bradley*. In *Mager*, this Court examined whether a public body has properly applied the FOIA's privacy exemption by including consideration of the FOIA's "core purpose"—"that all persons . . . are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees . . . so that [the people] may fully participate in the democratic process."[36] Other than a mere parenthetical reference,[37] the Court of Appeals below neither considered *Mager* nor provided a basis for disregarding the sound rule established in *Mager*.

In *Mager*, this Court unanimously determined that the FOIA's core purpose is relevant in analyzing whether the act's privacy exemption applies in a particular instance.[38] With the *Mager* decision, the analysis of section 13(1)(a) application has been given a clearer expression.

In *Mager*, the plaintiff requested the Michigan State Police to provide copies of gun permits.[39] The State Police denied the request, in part, by exempting the names, addresses, and related personal identifiers of persons who own registered handguns. This Court noted that "disclosure has been the consistent outcome where citizens seek to learn about government employees and their work," or where citizens seek "access to information regarding the manner in which public employees are fulfilling their public responsibilities."[40] Citing *Bradley's*

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[35] *Mager*, 460 Mich at 142-146.
[36] MCL 15.231(2).
[37] Unpublished opinion per curiam, issued March 22, 2007, (Docket No. 25866), p 3.
[38] *Mager*, 460 Mich at 147; Justice Cavanagh concurred in result only.
[39] *Mager*, 460 Mich at 135, 136.
[40] *Mager*, 460 Mich at 142-143.

definition of information of a personal nature, the Court found that gun ownership constitutes "information . . . of a personal nature [because] it reveals intimate or embarrassing details of an individual's private life."[41] The Court continued this threshold inquiry, however, by determining that the disclosure of such personal information would constitute a clearly unwarranted invasion of personal privacy because the release of the information under the FOIA would not serve the core purpose of the act.[42]

This Court recognized that the FOIA's core purpose protects and promotes the right of citizens to be informed about "'what their government is up to.'"[43] As to whether the personal information contained in gun permits is subject to disclosure, the Court applied the core purpose analysis concerning the nature of information subject to public dissemination versus that which may be exempt from public disclosure, and stated that part of this threshold inquiry includes a determination of whether the information being sought is[44]:

> Official information that sheds light on an agency's performance of its statutory duties. . . [The core] purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct. In . . . the typical case in which one private citizen is seeking information about another . . . the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to [such a] request would not shed any light on the conduct of any Government agency or official.

The application of personal privacy considerations is not limited to gun permits. The Court of Appeals applied the *Mager* analysis in *Kocher v Dep't of Treasury*,[45] deciding that the home addresses of persons entitled to unclaimed property held by the Michigan Department of Treasury are subject to privacy under section 13(1)(a) of the FOIA. In *Detroit Free Press v*

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[41] *Mager*, 460 Mich at 143-144.
[42] *Mager*, 460 Mich at 144-145.
[43] *Mager*, 460 Mich at 145, citing *United States Dep't of Defense v Federal Labor Relations Authority*, 510 US 487; 114 S Ct 1006; 127 L Ed2d 325 (1994).
[44] *Mager*, 460 Mich at 145-146.
[45] *Kocher v Department of Treasury*, 241 Mich App 378; 615 NW2d 767 (2000).

*Dep't of State Police*,[46] the Court of Appeals, taking guidance from *Mager*, determined that records containing the names, addresses, and other personal information about persons possessing concealed weapons permits are exempt from public disclosure. The *Mager* decision also was followed by the Court of Appeals in *Baker v City of Westland*,[47] where the Court determined that the names, addresses, and other personal identifiers and information concerning traffic accident victims constitute information subject to privacy.

Finally, in *Detroit Free Press v Consumer and Industry Services*,[48] the Court of Appeals, citing *Mager*, reviewed a FOIA case involving the request for copies of the insurance consumer complaint files of the then Department of Consumer and Industry Services (now the Department of Labor and Economic Growth). Under section 13(1)(a) of the FOIA, the department denied access to the names, addresses, and telephone numbers of consumers, as well as other personal identifiers. The department, however, granted the requester access to the nonexempt portions of the consumer complaint files. The Court of Appeals stated that a balance is struck by exempting from disclosure personal information of individuals, thus protecting their right to privacy, while preserving "the informative value" of the records sought.[49]

Importantly, this Court in *Mager* also recognized that one of the most important reasons for valuing privacy is the threat to personal safety that can arise through dissemination of private information[50]:

> Disclosure under the FOIA to the world at large of the names and addresses of citizens who possess registered handguns would create a virtual shopping list for anyone bent on the theft of handguns, interested, for malicious reasons, in the

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[46] *Detroit Free Press v Dep't of State Police*, 243 Mich App 218; 622 NW2d 313 (2000).
[47] *Baker v City of Westland*, 245 Mich App 90; 627 NW2d 27 (2001).
[48] *Detroit Free Press v Consumer and Industry Services*, 246 Mich App 311; 631 NW2d 769 (2001).
[49] *Detroit Free Press v Consumer and Industry Services*, 246 Mich App at 321.
[50] *Mager*, 460 Mich at 143.

identities and addresses of citizens who own handguns, and whatever else the criminal mind might evoke.

In *Stone Street Capital, Inc v Michigan Bureau of State Lottery*, the Court of Appeals, relying on *Mager*, held that the names, addresses, and other personal information of individuals who receive lottery winnings directly or are entitled to lottery awards by assignment or court judgment is information of a personal nature that is exempt from release under the FOIA because disclosure has the potential to endanger the lives of these individuals.[51]

In addition, Michigan courts have looked to federal decisions interpreting the federal FOIA[52] for guidance in interpreting the Michigan FOIA based on the high degree of similarity between the two statutes.[53] Federal courts have held that "[a]n invasion of privacy occurs when disclosure would subject a person to embarrassment, harassment, physical danger, disgrace or loss of employment or friends."[54]

The seminal case concerning the release of public employees' home addresses under the federal FOIA was *United States Dep't of Defense v Federal Labor Relations Authority*.[55] There, the Supreme Court ruled that "[public] employees' interest in nondisclosure [of personal identifying information] is not insubstantial," stating it was "reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions."[56]

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[51] *Stone Street Capital, Inc v Michigan Bureau of State Lottery*, 263 Mich App 683, 691; 689 NW2d 541 (2004).
[52] 5 USC 552 *et seq*.
[53] *Evening News Ass'n v City of Troy*, 417 Mich 481, 495; 339 NW2d 421 (1983).
[54] *Kilroy v NLRB*, 633 F Supp 136, 143 (SD Ohio, 1985), *aff'd* 823 F2d 553 (CA 6, 1987), emphasis added; see, also, *Kiraly v FBI*, 728 F2d 273, 277 (CA 6, 1984).
[55] *United States Dep't of Defense v Federal Labor Relations Authority*, 510 US 487, 500; 114 S Ct 1006; 127 L Ed 325 (1994).
[56] *United States Dep't of Defense*, 510 US at 500, 501.

Drawing from its earlier decision in *Dep't of Justice v Reporters Comm for the Freedom of the Press*,[57] the Supreme Court noted[58]:

> It is true that home addresses often are publicly available through sources such as telephone directories and voter registration lists, but "[i]n an organized society, there are few facts that are not at one time or another divulged to another." The privacy interest protected by Exemption 6 "encompass[es] the individual's control of information concerning his or her person."

The concept of protecting an individual's privacy for the sake of his or her personal safety is at the core of the matter now before this Court. The release of home addresses and home telephone numbers of employees of the University of Michigan has a startling potential for harm to employees. One need look only to the employees' affidavits filed by the University of Michigan in support of its motion for summary disposition.[59] Requiring the disclosure of the home addresses and home telephone numbers of identified employees, such as professors and instructors, would permit persons with malicious motives to use that information to harass or harm them or their families. Because the salaries of public employees are generally subject to FOIA disclosure,[60] the addition of home address disclosure would, as described in *Mager* and its progeny, provide a "virtual shopping list" for anyone bent on criminal conduct.

To the extent that a public record contains non-personal information of public employees, the nonexempt portion can be disclosed. The University of Michigan released to the FOIA requester the employees' work addresses and work telephone numbers, and only withheld identified home addresses and home telephone numbers. In *Herald Co v Bay City*, this Court recognized the important distinction between information relating to individuals' private lives

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[57] *Dep't of Justice v Reporters Comm for the Freedom of the Press*, 489 US 749, 763; 109 S Ct 1468; 103 L Ed 2d 774 (1989).
[58] *United States Dep't of Defense*, 510 US at 500-501.
[59] Copies of affidavits appended as Exhibits C through H to Appellant's Application for Leave to Appeal.
[60] See, *e.g.*, *Penokie v Michigan Technological University*, 93 Mich App 650; 287 NW2d 304 (1979).

that may be exempted from public disclosure and information relating to the operation and conduct of public body administration that is reasonably subject to public scrutiny.[61]

Based on *Mager*, the disclosure of a public body's records comprising identified home addresses and home telephone numbers will reveal little or nothing about the inner workings of the public body. Even assuming that disclosure of the personal information might be of some use to a requesting person, this limited use does not further a public purpose, does not aid participation in the democratic process, and does not preempt personal privacy rights. Public employees should not be denied the protection of their privacy rights simply because they choose employment in the public sector. In the instant case, the University of Michigan employees' right to keep private their home addresses and home telephone numbers outweighs any "informative value" that Plaintiff may claim, and this Court should so hold.

## II. This Court should reverse the decision of the Court of Appeals because in this instance, information, "ordinarily impersonal . . . might take on an intensely personal character," (quoting *Kestenbaum v Michigan State Univ*).

### A. Standard of Review

This case concerns the interpretation of a statute, MCL 15.243(1)(a); it presents questions of law that are reviewed *de novo*.[62]

### B. Analysis

Although home addresses and telephone numbers are identifying features of the domicile and may be available in the public record, these types of information are clearly of a personal character when grouped with other identifying features of individuals, private or public. The Court of Appeals erroneously concluded that in certain situations a case-by-case review should be granted to determine whether the privacy exemption could be properly asserted to prevent the

[61] *Herald Co v Bay City*, 463 Mich 111, 121-125; 614 NW2d 873 (2000).
[62] *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 525-526; 697 NW2d 895 (2005).

disclosure of such information in exceptional cases. A case-by-case analysis would be burdensome and creates uncertainty. A case-by-case analysis is not supported by precedent and is not necessary to determine that home addresses and telephone numbers of public employees have a personal character when they are disclosed along with other personal information. They provide nothing that enhances one's understanding of government, nor do they provide information that is pertinent to one's performance in his public capacity.

In *Bradley*, this Court made a threshold inquiry into whether information from public employees' personnel files that had been sought under the FOIA constituted "public business" as opposed to "private or personal business," where the records were "*solely* . . . performance appraisals, disciplinary actions, and complaints *relating to* [public school teachers' and administrators'] *accomplishments in their jobs*."[63] The Court held that those public employee personnel files were subject to release under the FOIA because the job performance of public employees falls under the scope of the act by providing citizens with information about the inner workings of the public body.[64]

The Michigan FOIA contains a specific exemption for personnel records of law enforcement agencies and is patterned after the federal FOIA, which includes a specific exemption for personnel records. Referring to the maxim of *expressio unius est exclusion alterius*, the *Bradley* Court determined that the public employment personnel files at issue were not exempt under the FOIA because the Michigan Legislature intended that those other personnel records of non-law enforcement public employees be available to the public.[65] The Court also stated that the case did not deal with personal information—"none of the [requested]

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[63] *Bradley*, 455 Mich at 295, emphasis added.
[64] *Bradley*, 455 Mich at 299-300.
[65] *Bradley*, 455 Mich at 299.

documents contain information of an embarrassing, intimate, private, or confidential nature, such as medical records or information relating to the plaintiffs' private lives."[66]

But, in any event, the facts in *Bradley* are distinguishable from the facts here. Whereas *Bradley* involved reviews and appraisals of certain job performance records of public employees, the instant case, in stark contrast, deals with the home addresses and home telephone numbers of public employees. The marked differences between these fact situations emphasizes the crucial deficiency in the Court of Appeals' decision—it failed to recognize the difference between *performance-related* personnel information that generally is disclosable and *non-performance-related* personnel information that is protected from public disclosure.

Obtaining the *home* addresses and *home* telephone numbers of the public employees provides no readily discernible insight into the inner workings of the public body employer. The University of Michigan publicly released its employees' *work* addresses and *work* telephone numbers. While such information arguably is work-related and work-based, there is no comparable rationale for the public release of the employees' home addresses and home telephone numbers.

Even if this Court does not revisit *Bradley's* definition of "personal nature," the Court should still reverse the decision of the Court of Appeals because *Bradley* applies only to job-performance-related personnel information and not to personal information such as home addresses and phone numbers. The Court of Appeals incorrectly determined that the home addresses and home telephone numbers of University of Michigan employees constitute a type of personal information distinguishable from the type of protected personal information in *Mager* and its progeny. This court should find that there is a distinction between non-job-related personnel information and job-related personnel information and hold that in this instance home

[66] *Bradley*, 455 Mich at 295.

phone numbers and addresses of public employees take on an intensely personal character and are exempt from disclosure.

## III. The advent of the National Do-Not-Call Registry, PL 108-82, § 1, 117 Stat 1006, along with the creation of a host of methods unknown to the Court in 1997, which are designed for illicit purposes such as identity theft, indicates that the disclosure of the home addresses and telephone numbers requested is inconsistent with "the customs, mores, or ordinary views of the community" (quoting *Bradley*, at 294) by which the applicability of the privacy exemption is evaluated.

### A. Standard of Review

This case concerns the interpretation of a statute, MCL 15.243(1)(a); it presents questions of law that are reviewed *de novo*.[67]

### B. Analysis

Amicus Curiae Attorney General urges this Court to rule that non-performance-related information of a personal nature that serves to identify a person, including home addresses and home telephone numbers, is protected from disclosure under section 13(1)(a) of the FOIA as a "clearly unwarranted" invasion of an individual's privacy. This is because technological advances in information sharing have so revolutionized the ability to disseminate information across the globe that it poses a risk of harm to an individual if that information is released.

The FOIA was enacted in 1977, long before the existence of the internet as we know it today, with its ability to disseminate and transfer information instantly. Even when *Bradley* was decided, many of the tools used today by individuals to commit identity theft were not available. The FOIA was intended to provide individuals with a legal procedure to inform themselves about the inner workings of government; it was not intended as an avenue for the unlimited attainment of personal information about public employees.

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[67] *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 525-526; 697 NW2d 895 (2005).

The Federal Trade Commission estimates that nine million Americans have their identities stolen each year.[68] The FTC warns about the dangers associated with revealing personal information such as social security numbers, credit card numbers, driver's license numbers, birthdates, telephone numbers and home addresses.[69] The modern victim of identity theft is very vulnerable when the modern identity thief has access to his personal information.

Regardless of whether *Bradley* was wrongly decided in 1997, modern advances in technology allow personal information to be used for illicit purposes with greater facility than ever. The Federal Government has tried to combat this increasingly dangerous criminal activity with such policies as the National Do-Not-Call Registry, which allows people more efficiency in controlling the amount and frequency of calls they receive at home from telemarketers, but identity theft is still an increasingly dangerous problem.[70] Because of the advances in technology, a narrow definition of "information of a personal nature" that would permit the disclosure of home addresses and home telephone numbers of public employees would constitute a "clearly unwarranted invasion of an individual's privacy" in today's society. With the prevalence of identity theft today, the release of this information is clearly inconsistent with "the customs, mores, or ordinary views of the community."

The Court of Appeals in the instant case considered whether disclosure of identified home addresses and home telephone numbers *alone* passed the *Booth Newspapers* two-prong test: whether the information at issue is of a personal nature, and, if so, whether the invasion of privacy resulting from the release of this personal information would be "clearly unwarranted."[71] The Court of Appeals found "that there is no authority holding that public employees' home

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[68] http://www.ftc.gov/bcp/edu/microsites/idtheft/consumers/about-identity-theft.html
[69] *Id.*
[70] Do-Not-Call Registry, PL 108-82, § 1, 117 Stat 1006; http://www.ftc.gov/donotcall.
[71] *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 232; 507 NW2d 422 (1993).

addresses and telephone numbers are items of personal information for purposes of FOIA [and that Plaintiff did not seek] disclosure of addresses *to access other information our Courts deemed personal.*"[72]

Moreover, the Court of Appeals in the instant case misapplied *Tobin* to support its finding that "that there is no authority holding that public employees' home addresses and telephone numbers are items of personal information for purposes of FOIA."[73] *Tobin* is an inappropriate vehicle for analyzing whether home addresses and home telephone numbers are properly exempted from disclosure in the first instance. It does not stand for the proposition that the personal information must be released under the FOIA and is distinguishable from the instant case in important ways. In *Tobin*, this Court found it "unnecessary to decide whether the Freedom of Information Act requires disclosure of the list of names and addresses" and declined to "undertake to construe the privacy exemption authoritatively."[74] Rather, this Court merely examined whether release of names and addresses would be actionable in a tort lawsuit based on common law theories of invasion of privacy or on constitutional notions of privacy. While the common law and constitutional notions of privacy are relevant guides in determining whether disclosure of information under the FOIA would constitute a clearly unwarranted invasion of privacy, they are not "coextensive with the scope of privacy under the FOIA."[75] The privacy exemption under FOIA is designed to protect privacy interests beyond the common law.

A public body generally lacks authority to impose or require safety measures *after* it releases information. The FOIA contains no mechanism for the control of information once it is

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[72]Unpublished opinion per curiam, issued March 22, 2007, (Docket No. 25866), p 3; copy appended as Exhibit A to Appellant's Application for Leave to Appeal, emphasis added.
[73] Unpublished opinion per curiam, issued March 22, 2007, (Docket No. 25866), p 3; copy appended as Exhibit A to Appellant's Application for Leave to Appeal.
[74] *Tobin*, 416 Mich at 671.
[75] *Swickard*, 438 Mich at 547.

publicly released.[76] Each and every release of this information may result in an additional invasion of personal privacy. Therefore, section 13(1)(a) of FOIA must be invoked by the public body to protect the private information *before* the information is disseminated.[77] If the University of Michigan were compelled to release to the instant requester the identified home addresses and home telephone numbers of University employees, consistency would require that such information be released to all requesters. The University would therefore be unable to ensure that the disclosure of home addresses and home telephone numbers was used only for benign purposes. In *Tobin* this Court acknowledged that release of names and home addresses might constitute an invasion of the common law and constitutional rights of privacy in certain situations, stating that "[i]f the publication of names and addresses of specific persons was made with the expectation and hope that it would, for example, bring others to molest them and their families, a different result might be required."[78]

In the instant case, the Court of Appeals' decision disregarded *Mager's* recognition of a critical consideration that should be raised in analyzing the privacy exemption—the threat to personal safety that can arise through the uncontrolled dissemination of private information.[79] The revered status of the home in the American legal system cannot be questioned, having its roots in the common law: "For a man's house is his castle, *et domus sua cuique tutissimum refugium* [and where shall a man be safe if it be not in his own house?]."[80] The dangers inherent

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[76] *State Employees Ass'n v Dep't of Mgt and Budget*, 428 Mich 104, 125-126; 404 NW2d 606 (1987); *Mullin v Detroit Police Dep't*, 133 Mich App 46, 52; 348 NW2d 708 (1984).
[77] MCL 15.243(1)(a).
[78] *Tobin*, 416 Mich at 674-675.
[79] *Mager*, 460 Mich at 143.
[80] Morris Dictionary of Word and Phrase Origins, William and Mary Morris (HarperCollins, New York, 1977, 1988), attributed to the English jurist, Sir Edward Coke (1552-1634).

in modern day information disclosure are magnified exponentially by the capabilities of the Internet and a lack of control of requester behavior.[81]

In the instant case, the Court of Appeals also failed to consider the *Stone Street Capital* decision that defined information of a personal nature to include home addresses and home telephone numbers the disclosure of which would constitute a clearly unwarranted invasion of an individual's privacy because it "has the potential to endanger the occupants of the household."[82] Relying on *Mager*, the Court in *Stone Street Capital* applied the FOIA's core purpose, stating: "Revealing the names, addresses, and other personal information of individuals who receive lottery winnings . . . is 'entirely unrelated to any inquiry regarding the inner working of government, or how well [defendant] is fulfilling its statutory functions.'"[83]

To accommodate those University of Michigan employees who might object to the disclosure of their residence and telephone information, the Court of Appeals suggested the equitable remedy of injunctive relief.[84] This is not a tenable solution. In *Tobin v Civil Serv Comm'n*, this Court dealt with a "reverse" FOIA case in which the plaintiffs sought an injunction preventing the release of their names and home addresses under the act.[85] Since the FOIA does not provide for such injunctive relief, and the decision to withhold public records under the applicable exemptions is purely discretionary, this Court held that "[a]ny asserted right by third parties to prohibit disclosure must have a basis independent of the FOIA."[86]

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[81] See, *e.g.*, http://lsj.com under "data connection"—Lansing State Journal published databases (and related news articles) disclosing public employees' names and salaries in a retrievable format virtually world-wide and beyond the control of the public employees.
[82] *Stone Street Capital,* 263 Mich App at 691, 692, emphasis added.
[83] *Stone Street Capital,* 263 Mich App at 692; quoting *Mager*, 460 Mich at 146.
[84] Unpublished opinion per curiam, issued March 22, 2007, (Docket No. 25866), p 3; copy appended as Exhibit A to Appellant's Application for Leave to Appeal.
[85] *Tobin v Civil Serv Comm'n,* 416 Mich 661; 331 NW2d 184 (1982).
[86] *Tobin*, 416 Mich at 669.

The fact that a FOIA requester may not intend to use the home addresses and home telephone numbers of public employees to embarrass, harass, or threaten the employees does not diminish the invasion of privacy resulting from disclosure.

In summary, the Court of Appeals critically erred when it failed to take into consideration the potential harm to the public employees that would be caused by the release of such private information. Furthermore, when construing FOIA's privacy exemption, the release of such home address and telephone numbers must be viewed in the context of the rapid information distribution technologies that now exist. The Court of Appeals should not have relied upon the holdings in *Bradley* and *Tobin* as determinative of the issue of whether home addresses and home telephone numbers of University of Michigan employees are subject to disclosure under the FOIA, and should have taken direction instead from this Court's decision in *Mager*.

## CONCLUSION

An individual's home address and home telephone number constitute personal information regardless of whether the individual is employed in the private or public sector. The disclosure of such information is clearly unwarranted since it does nothing to further the core purpose of the FOIA "to provide full and complete information regarding the affairs of government and the official acts of those who represent [the people] as public officials and public employees." Home addresses and home telephone numbers of public employees are unrelated to the offices of government or its official acts. Consequently, this Court should reverse the Court of Appeals and hold that the University of Michigan may protect from disclosure the home addresses and home telephone numbers of its employees.

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